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No. 80-1349
IN THE

Supreme Court of the United States

October Term 1980

THE STATE OF WASHINGTON,

Petitioner,

v.

NEIL CHRISMAN,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF WASHINGTON

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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ABCD AT CRAFTSMAN PRESS, SEATTLE

QUESTION PRESENTED

This amicus believes that the only question properly presented is whether Respondent's joint tenant voluntarily consented to return to his room with the arresting officer after having been placed under arrest.

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STATEMENT OF THE INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Washington is a statewide, non-partisan organization dedicated to defending the liberties guaranteed by the Bill of Rights. A principal concern of the ACLU-W has always been the security of Washington citizens against invasions of their homes, "the chief evil against which the wording of the Fourth Amendment is directed." United States v. United States District Court, 407 U.S. 297, 313 (1972).

Out of this concern, the ACLU-W has argued major Fourth Amendment issues here and in the lower courts, and has responded to countless citizen complaints about police actions similar to this one. Our interest here is to answer the sweeping claims of state power made by Petitioner and its supporting amici, and to focus the narrow Fourth Amendment issue we believe this case presents. The parties have consented to our appearance. Rule 36.2.

STATEMENT OF THE CASE

This case arose from a warrantless entry and search of Respondent Neil Chrisman's college dormitory room, which resulted from the arrest of his roommate, James Overdahl, for possession of alcohol.[1] The facts the Supreme Court of Washington held controlling are relatively straightforward. Those facts involve the two critical incidents here: the arresting officer's decision to go to Overdahl's and Chrisman's room, and his actions once there. The testimony on both these points was clear and undisputed.

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[1] Respondent and Overdahl were jointly charged, and jointly represented in the courts below, until Overdahl's dismissal while the case was pending in the state supreme court. Up to that time, the focus of the case was on the relation between the statements Overdahl made at the time of his arrest, without Miranda warnings, and the search that followed them. See State v. Chrisman, 24 Wn. App. 385, 388-9, 600 P.2d 1316 (1980). Overdahl's removal from the case after briefing was completed (see Washington Rule of Appellate Procedure 13.7 (a)) may have resulted in some confusion in the arguments below.

Officer Daughtery testified that, after he arrested Overdahl (RP 5),

> I then asked the subject for his identification. He stated that he did not have any. He then asked me to hold the bottle while he returned to his dorm room to obtain the proper identification. I stated at that time it was not our policy to subsequently let an individual leave from an area at that particular point without, it just was not the way that we handled the situation....
>
> I stated to him that he could not go alone because we just don't release people from custody....
>
> I stated that he could not go back to his room, and that we could both go up which he stated to me okay. We then entered back into Orton Hall ....

RP 5-6. A witness to this conversation, Lisa Anthony, testified the officer's terms were somewhat more forceful:

> Q. And, when Carl said it was up in his, his identification was up in his room, what did the officer say in response to that?
>
> A. He says where do you live, and Carl told him 1141.
>
> Q. And, then what did the officer say?
>
> A. He said let's go to 1141.

RP 83.

Officer Daugherty testified that, as the two were approaching the room,

> I observed the door to be open approximately 3 to 4 inches. As we got to the room Mr. Overdahl pushed the door open and entered the room. I stood in the doorway without entering, actually physically entering the room.

RP 7. From that vantage point the Officer observed a marijuana pipe and seeds.[2] That observation led the Officer to go farther into the the room, where he placed Respondent under arrest and obtained consent for the more thorough search of the room in which he found the drugs Respondent was convicted of possessing. RP 21-28.

We believe these facts, and these facts alone, control this case. The only issue

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[2] RP 18. The confusion as to whether the Officer was inside or outside the room apparent in Petitioner's Brief (at 5-7) is, as the court below said, a confusion over legal "niceties". State v. Chrisman, 94 Wn.2d 711, 716, 619 P.2d 971 (1980).There was no confusion in the officer's testimony:

> Q. Okay. Were you in the hallway or were you in the doorway?
> A. I was standing against the doorjamb.

RP 9.

presented by the petition here is, as the state supreme court framed it, "whether [the officer] had a right to be" "in the room when he observed the seeds and pipe." State v. Chrisman, supra, 94 Wn.2d at 716. If he did, the search was proper. If he did not, the lower court held the illegality of that observation "tainted" all his subsequent actions (94 Wn.2d at 717-18)--and that holding has not been challenged in this petition. In either case, there is no reason to reach the sweeping and novel Fourth Amendment issues Petitioner and its supporting amici seek to raise here.

I. THE SOLE ISSUE IN THIS CASE IS WHETHER OVERDAHL VALIDLY CONSENTED TO OPEN HIS ROOM TO OFFICER DAUGHERTY'S ENTRY AND VIEW.

Officer Daugherty's "right to be" where he was when he saw the marijuana pipe and seeds from the doorjamb of the room depends we submit, wholly on the legal significance of the conversation with Overdahl which brought him there.

Clearly, Overdahl's arrest alone gave the Officer no power to direct Overdahl to the room he shared with Respondent or to enter or examine that room. Chimel v. California, 395 U.S. 752 (1969); Shipley v. California, 395 U.S. 818 (1969). If the Officer had that power, he could obtain it only through Overdahl's consent.[3] See Giacalone v. Lucas, 445 F.2d 1238, 1247, 1256-8 (6th Cir. 1971); 2 LaFAVE, SEARCH AND SEIZURE 421-2 (1978). If that consent was obtained through "colorable lawful coercion," it was invalid, Bumper v. North Carolina, 391 U.S. 543, 549-50 (1968), and can justify neither the opening of the dorm room door nor the entry into it. See Johnson v. United States, 333 U.S.10 (1948).

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[3] If the officer's power to enter the room derived from the arrest alone, the issue here would be controlled by Washington law, which more strictly limits the powers of an officer making an arrest for a petty offense than does the federal constitution. See State v. Hehman, 90 Wn.2d 45, 578 P.2d 527 (1979).

If Overdahl had consented voluntarily to have the Officer go to the room with him, the authority he so conferred would not have ended at the doorjamb where the Officer first stopped.

Although the Washington Supreme Court's decision was not clearly based on this rationale, its reading of the record establishes the absence of voluntary consent. Overdahl went to his room only in response to the Officer's demand for identification, which Overdahl had by then admitted would not prove that he was lawfully in possession of the alcohol. RP 7. Overdahl initially asked to go to his room alone. RP 5. The Officer either suggested (RP 5-6) or demanded (RP 83) to go to the room with him. Overdahl was a young man under arrest (RP 37), and was not advised he had any right to refuse. The totality of circumstances here did not demonstrate voluntary consent. Compare

United States v. Watson, 423 U.S. 411 (1976); Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

We submit that is all this Court need decide in this case. Arrest simpliciter cannot justify a residential search; but valid third-party consent can. This case begins and ends with the validity of Overdahl's consent.

II. THE FACTS AND PETITION HERE DO NOT PROPERLY RAISE ANY QUESTION OF "EXIGENT CIRCUMSTANCES" OR "GOOD FAITH."

Petitioner and its supporting amici have gone far beyond the facts and the petition here in their requests that this Court create "exigent circumstances" and "good faith" exceptions to the Fourth Amendment and the exclusionary rule. Neither of these issues is necessarily or properly raised by this case.

The "good faith" argument barely mentioned by Petitioner (Pet. Br. 69), but more strenuously urged by its amici, was

raised neither in the courts below nor the Petition here. This Court has always said the Fourth Amendment's protection cannot turn on "subjective good faith alone." Beck v. Ohio, 379 U.S. 89, 97 (1964). Though that dictum has recently been questioned in a context very different from that here, Williams v. United States, 622 F.2d 830, (5th Cir. 1980), cert. denied, 101 S.Ct. 946 (1981), its continued validity is not properly at issue in this case. Rule 21.1(a), (h).

Petitioner's "exigent circumstances" argument (Pet.Br. 19-52) was made below and is properly raised here, but need not be reached. As we argued above, if Officer Daugherty had the right to have the room opened for his observation, he obtained the right to enter it not from any "exigent circumstances," but from the same source--Overdahl's consent. If the room was opened to him by invalid consent, the

"exigencies" that then arose--solely as a result of his unnecessary demand for incriminating information--cannot change that fact or separately justify his later actions.

CONCLUSION

The decision of the Supreme Court of Washington should be affirmed.

Respectfully submitted,

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September 1, 1981